2304

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 318.

J. HENRIETTA HOFFELD, EXECUTRIX OF RUDOLPH HOFFELD, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 11, 1901.

(18,151.)

(18,151.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 318.

J. HENRIETTA HOFFELD, EXECUTRIX OF RUDOLPH HOFFELD, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed June 5, 1900	1	1
Traverse, filed December 10, 1900	4	3
Findings of fact	5	3
Conclusion of law	6	5
Opinion of the court	7	5
Judgment of the court	8	7
Motion of claimant for new trial	9	7
Opinion of the court overruling motion for new trial	10	8
Application for and allowance of appeal	12	10
Certificate of clerk	14	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1901.

1 In the United States Court of Claims.

J. HENRIETTA HOFFELD, Executrix of the Estate of Rudolph Hoffeld, Deceased, Claimant,
vs.
THE UNITED STATES, Defendant.
} No. 21872.

I.—*Petition. Filed June* 5, 1900.

The petition of J. Henrietta Hoffeld, executrix of the estate of Rudolph Hoffeld, deceased, respectfully represents:

1. That she is a citizen of the United States, residing in the town of Lancaster, Erie county, State of New York; that she has always yielded true allegiance to the Government of the United States of America, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; that in her as executrix as aforesaid is vested the title to the claim hereinafter sued on, neither she nor her testator, the said Rudolph Hoffeld, deceased, ever having sold or assigned the same, or any part thereof, to any person or persons.

2. That said Rudolph Hoffeld, in his lifetime, was the owner of all the rights originally acquired by Harry Jones, J. L. Cole, Charles L. Weaver and Samy Perri to coal entry number 13, Ute series, at Gunnison, Colorado. That William L. Hinds, the attorney-in-fact of said entrymen, paid to the United States thirty-two hundred ($3,200.00) dollars purchase-money for one hundred and sixty (160) acres of coal lands described as follows: The northeast quarter (N. E. ¼) of section thirty-five (35), in township fourteen (14) south, of range eighty-seven (87) west, sixth (6th) P. M., Colorado.

2 Petitioner further states that the said purchase was made under coal entry 13, Ute series, May 28, 1886, in the names of Harry Jones, J. L. Cole, Charles L. Weaver and Samy Perri, applicants therefor, and that said applicants or entrymen on May 29, 1886, by William L. Hinds, their attorney-in-fact, conveyed the above-described land to the Ohio Creek Anthracite Coal Company, for a recited consideration in the deed of thirty-two hundred ($3,200.00) dollars, and by virtue of a judgment against the said Ohio Creek Anthracite Coal Company, a sheriff's deed was, on November 10, 1887, made to Rudolph Hoffeld, a purchaser at an execution sale under said judgment. Said Rudolph Hoffeld has since deceased, he having duly appointed J. Henrietta Hoffeld, the petitioner, as his executrix by his last will and testament, and the surrogate court of the county of Erie, State of New York, granted to her letters testamentary of the said last will and testament.

Petitioner further states that long after the payment of the said money the Commissioner of the General Land Office affirmed that an error was committed in the allowance of the said entry upon the affidavit of William L. Hinds, under a power of attorney, in the absence of Harry Jones, J. L. Cole, Charles L. Weaver and Samy Perri to act for and in the names of said Jones, Cole, Weaver and

Perri and exacted an affidavit of said Jones, Cole, Weaver and Perri claimed to be required by section 32 of the coal-land regulations.

Petitioner further states that of the said Jones, Cole, Weaver and Perri two had departed this life and the other two could not be found at the time of said exaction, and hence it was impossible to comply with the requirement of the Commissioner of the General Land Office.

Petitioner further states that the entire transaction from beginning to end was above board and known in all its parts to the register and receiver of the land office where the entry was made, and that the money was received for the United States with a knowledge of all the facts and without any concealment or subterfuge whatever on the part of any of the parties in interest, and that whatever errors were made in the allowance of the purchase of the said coal land were errors for which the officers of the land office were solely responsible.

Petitioner further states that the purchase of the said coal land was canceled by the Commissioner of the General Land Office on January 27, 1895, about eight years and eight months after
3 it was made, and more than seven years after said Rudolph Hoffeld purchased said land, for alleged errors committed in the allowance of the purchase to be made on the papers presented.

Petitioner further states that by the cancellation of the said purchase, Rudolph Hoffeld, in his lifetime, and J. Henrietta Hoffeld, as executrix of his estate, have been deprived of the entire consideration for which the said thirty-two hundred ($3,200.00) dollars purchase-money was paid to the United States, and petitioner further states that the act of June 16, 1880, is a contract on the part of the United States to repay to petitioner the said purchase-money, and that application for repayment under said act, of the said purchase-money, was made to the Commissioner of the General Land Office, and that said Commissioner on November 4, 1897, denied such repayment, from which an appeal was taken to the Secretary of the Interior, who rejected said application on December 11th, 1899.

Wherefore petitioner prays judgment of this court against the United States in the sum of thirty-two hundred ($3,200.00) dollars.

J. HENRIETTA HOFFELD,
Ex'r'x, Claimant.

ANDREWS & ANDREWS,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

W. Robert Andrews being first duly sworn deposes and says that he is a member of the firm of Andrews & Andrews, who are attorneys for the claimant named in the foregoing petition, and that he believes the facts stated in such petition are true and that there is due the claimant from the United States the sum of thirty-two hun-

dred ($3,200.00) dollars over and above all offsets thereto against the claimant on the part of the United States.

W. ROBERT ANDREWS.

Subscribed and sworn to before me this 5th day of June, A. D. 1900.

[SEAL.] GEO. E. TERRY,
Notary Public, D. C.

4 II.—*Traverse. Filed December* 10, 1900.

J. HENRIETTA HOFFELD, Executrix of Rudolph Hoffeld,
vs.
UNITED STATES. } No. 21872.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

5 III.—*Findings of Fact and Conclusion of Law.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

On May 28, 1886, there was entered by Harry Jones, J. L. Cole, Charles L. Weaver, and Samy Perri, through William Hinds, acting in their behalf under a power of attorney, the N. E. ¼ section 35, township 14 S., range 87 W., of the sixth principal meridian, as coal entry No. 13, at Gunnison, Colo., the sum of $3,200 being paid therefor.

II.

The affidavit required by section 32 of the coal-land regulations was not made by the several entrymen, but by the said William Hinds as attorney-in-fact. This affidavit was held to be insufficient by the General Land Office on April 12, 1888, and the local land officers were directed to notify the claimants to that effect. No report having been received from the local officers of their action under said instructions, such report was called for by the General Land Office on August 11, 1894. On August 27, 1894, the local officers reported that two of the entrymen were reported dead; that Perri and Cole were no longer residents of Colorado; that their whereabouts could not be ascertained; that none of the entrymen had any interest in said tract of land at that time; that the representatives of the present owners, W. L. Youle, stated that the evidence required could not be furnished; that no coal in paying quantities existed on said tract, and that the owners are indifferent as to whether said entry is canceled or not. Whereupon the entry was held for cancellation by the General Land Office on October 4,

1894. Neither the entrymen nor their assigns took any action in the premises, and accordingly the entry was canceled by the General Land Office on January 24, 1895.

The affidavit required by section 32 of the coal-land regulations is to the effect that each entryman made the entry for his own advantage and benefit, and not, directly or indirectly, for the use and benefit of any other person or persons.

III.

On May 29, 1886, the entrymen of said tract of land, to wit, Harry Jones, J. L. Cole, Charles L. Weaver, and Samy Perri, by their
6 said attorney-in-fact, W. L. Hinds, conveyed the aforesaid tract of land to the Ohio Creek Anthracite Coal Company. On August 29, 1887, a writ of attachment was issued out of the county court of Gunnison county, Colo., in a suit wherein Asenath L. Hinds was plaintiff and The Ohio Creek Anthracite Coal Company was defendant, and levied upon the aforesaid tract of land, as well as other land belonging to the said company. On August 23, 1887, a like writ of attachment was issued out of the district court of Arapahoe county, Colo., in a suit wherein The Hendric and Bolthoff Manufacturing Company were plaintiffs and The Ohio Creek Anthracite Coal Company was defendant, and levied upon the aforesaid tract of land, as well as other land belonging to the defendant company. On November 10, 1887, the aforesaid tract of land "and other property" was sold by the sheriff of Arapahoe county, Colo., to Rudolph Hoffeld, at and for the recited consideration of $75, on account of the aforesaid writ of attachment, in the suit wherein The Hendric and Bolthoff Manufacturing Company were plaintiffs and The Ohio Creek Anthracite Coal Company was defendant.

Subsequently the land in question was sold by the county treasurer of Gunnison county, Colo., to W. T. Lambert, for the non-payment of taxes thereon; and subsequently, to wit, on March 5, 1896, by order of the county commissioners of Gunnison county, the county treasurer was "authorized to remit and cancel the assessment and levy of all taxes now due and unpaid to the county," because the title and ownership to said land was still in the United States of America.

IV.

On June 10, 1897, William L. Youle, as attorney-in-fact for Rudolph Hoffeld, made application for repayment of the purchase-money paid on said land under the provisions of the act of June 16, 1880, which was denied on November 4, 1897, and again on appeal to the Secretary of the Interior on December 11, 1899, for the reason that said application did not come within the provisions of the said act of June 16, 1880.

V.

That W. L. Youle made an affidavit reciting that the duplicate receipt issued by F. J. Leonard, receiver of the United States land

office in Gunnison, Colorado, dated May 28, 1866 in the name of Harry Jones, J. L. Cole, Charles W. Weaver and Samy Perri for the sum of three thousand two hundred dollars ($3,200) purchase-money for the N. E. quarter of section 35, town 14, S., R. 87 W., Gunnison, Colorado, and for which certificate No. 13 Ute series was issued was destroyed by fire June 17, 1890; that said affidavit was made on December 23, 1898, and is now on file in the General Land Office.

VI.

Rudolph Hoffeld, on February 24, 1896, executed and delivered a quitclaim deed to the United States for the N. E. quarter of section 35 town 14 S., R. 87 W., county of Gunnison, State of Colorado. Said deed is on file in the General Land Office, as appears by certified copy now on file in this court.

Conclusion of Law.

The court decides as a conclusion of law upon the foregoing facts that the claimant has no right to recover, and the petition is therefore dismissed.

BY THE COURT.

7 IV.—*Opinion of the Court.*

WELDON, J., delivered the opinion of the court:

The plaintiff, as executrix of Rudolph Hoffeld, brings this suit to recover the sum of $3,200, which was paid to the United States in the entry of certain land in Gunnison county, Colo., on the 28th of May, 1886.

The findings of fact show, that on that date Harry Jones, J. L. Cole, Charles L. Weaver, and Samy Perri, through William Hinds, acting in their behalf under power of attorney, made entry of said land. The affidavit required by section 32 of the coal-land regulations was not made by the several entrymen, but by Hinds as attorney-in-fact. The affidavit was held to be insufficient by the officers of the General Land Office, on April 12, 1888, and the local land officers were directed to notify the claimants to that effect. On August 27, 1894, the local officers reported that two of the entrymen were dead; that Perri and Cole were no longer residents of Colorado; that their whereabouts could not be ascertained; that none of said entrymen had any interest in said land; that the representatives of the present owners, W. L. Youle, stated that the evidence required could not be furnished; that no coal in paying quantities existed on said tract, and that the owners are indifferent as to whether said entry is canceled or not. Neither the entrymen nor their assigns took any action in the premises, and accordingly the entry was canceled by the General Land Office on January 24, 1895. On May 29, 1886, said entrymen, by their said attorney-in-fact, had conveyed the land to the Ohio Creek Anthracite Coal Com-

pany. On August 29, 1887, a writ of attachment was issued out of the county court of Gunnison county, Colo., in a suit, wherein Asenath L. Hinds was plaintiff and said company was defendant, and levied upon the aforesaid tract of land as well as other land belonging to said company. On August 23, 1887, a like writ of attachment was issued out of the district court of Arapahoe county, Colo., in a suit wherein The Hendric and Bolthoff Manufacturing Company were plaintiffs and The Ohio Creek Anthracite Coal Company was defendant, and levied upon said tract of land as well as upon other land belonging to said company. On November 10, 1887, the aforesaid tract of land and other property was sold by the sheriff of Arapahoe county to Rudolph Hoffeld for the sum of $75, under the said writ of attachment, in the suit wherein The Hendric and Bolthoff Manufacturing Company was plaintiff and The Ohio Creek Anthracite Coal Company was defendant. On June 10, 1897, William L. Youle, as attorney-*of*-fact for Rudolph Hoffeld, made application for repayment of the purchase-money paid on said land, under the provisions of the act of June 16, 1880, which was denied on November 4, 1897, and again on appeal to the Secretary of the Interior on December 11, 1899, for the reason that the said application did not come within the provision of said act of June 16, 1880.

The theory upon which the suit is predicated is, that the administrator of Hoffeld, whose decedent purchased at sheriff's sale on November 10, 1887, is entitled to the benefit of the statute of June 16, 1880 (21 Stat. L., 287); and to recover the amount paid by the original entrymen through their attorney-in-fact this suit was brought.

The statute, section 2, provides that "where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, the amount of purchase-money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

In the view which the court has taken of the rights of the claimants, it is not necessary to discuss the question as to whether the entry was properly made or whether it was improperly canceled.

8 It is sufficient for the purposes of this case to examine and determine the question as to whether there are such relations between the claimant, as representative of the decedent, and the entrymen, as will entitle the claimant to the benefit of the statute. The statute provides that in case of conflict, or where from any cause the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions and the amount of purchase-money. The right to reimbursement by the terms of the statute is confined to the person

who made the entry, his heirs or assigns, and it does not inure to, and is not made applicable to any other person. Whatever may be the rights of the original entrymen, can it be said that the purchaser at a judicial sale is in such privity of contract or statutory obligation as entitles him to recover on failure of title because of the cancellation of the entry?

The doctrine of *caveat emptor* applies in all its force to a judicial sale, and the purchaser at such a sale buys the title or estate which the defendants in execution may have without the rights and benefits of covenants of warranty which inure to the ordinary purchaser. (15 Ill., 395; 25 Ala., 626; 2 Ohio N. S., 36.)

The claim of the plaintiff must be determined and measured by the statute which authorizes the refunding of the money. The claim is purely of statutory obligation without any of the elements of a contract or covenant and must be brought clearly within the terms of the statute before any recovery can be had.

A very serious question might arise as to whether the parties or their assigns to the entry could have such a standing in court as to entitle them to a remedy under the act of June, 1880; but it is not necessary to discuss and determine their right of redress, as the plaintiff cannot rely on their legal or equitable right of recovery. The plaintiff's rights are measured by the purchase at the judicial sale, and those rights being limited by the law which governs judicial sales of realty, no liability attaches to the defendant predicated upon an alleged right in entrymen or their assigns. The petition is therefore dismissed.

V.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 21st day of January 1901, judgment in the above-entitled cause was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants and do order adjudge and decree that the petition of the claimant J. Henrietta Hoffeld executrix of Rudolph Hoffeld deceased, be dismissed.

BY THE COURT.

9 VI.—*Motion of Claimant for New Trial.* *Filed Feb'y* 11, 1901.

J. HENRIETTA HOFFELD. Executrix of the Estate of Rudolph Hoffeld, Deceased, Claimant,
vs.
THE UNITED STATES. } No. 21872.

Now comes the claimant, by Andrews & Andrews, her attorneys, and moves the court to grant her a new trial in the above-entitled cause, which was decided in favor of the defendant on January 21, 1901, and as grounds therefor assigns the following errors:

1. In holding that Rudolph Hoffeld, because he purchased the land for which repayment is claimed at a judicial sale, is not an as-

signee of the entrymen within the purview of section 2 of the act of June 16, 1880, relating to the repayment of certain fees, purchase-money and commissions paid on void entries (21 Stats., 287).

2. In not holding that the claimant was entitled to recover under the second section of said act of June 16, 1880.

3. In not rendering judgment for the claimant for the sum of three thousand two hundred dollars.

Respectfully submitted.

ANDREWS AND ANDREWS,
Att'ys for Claimant.

10 VII.—*Opinion of the Court Overruling Claimant's Motion for New Trial, April* 8, 1901.

WELDON, J., delivered the opinion of the court:

It is insisted by counsel for the claimant, that the court erred in holding that such claimant is not entitled to the benefit and right provided by the second section of the act of June 16, 1880 (21 Stat. L., 287), which provides, in substance, that in case an entry of land is for any reason canceled, that the entryman, his heirs or assigns, upon certain conditions, are entitled to a repayment of the purchase-money.

It is insisted that the entryman has a complete title to the land; that he has a right to sell it before patent, and that the purchaser at a judicial sale under an execution against the entryman is a party entitled to repayment under the provisions of said act, providing that assigns may apply therefor, and that the statute clearly gives the right of repayment to such a purchaser.

The motion presents the question whether the term "his heirs or assigns," within the meaning and purview of the act, means his voluntary assigns or does it also include purchasers who are not his assigns, but transferees of the land by operation of law—that is, by virtue of the Colorado statute which authorizes land conveyed by an entry to be sold under judgment and execution.

In the decision of the case the court construed the phrase "his heirs and assigns" according to its primary natural meaning to be his own—his voluntary—assigns.

It is only by the extension of the phrase so as to include the transferees of the land by operation of law, that the claimant's theory of the statute can be sustained.

A grant or an assignment primarily implies a grantor or an assignor, and not the mere transfer of title by operation of law.

The second section of the act provides as follows: "Upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land," etc. Does not this clause clearly indicate that Congress did not intend to extend the meaning of "his assigns" so as to include a purchaser at an involuntary, forced, or judicial sale? Such purchasers would not have the "duplicate receipt" to surrender to the Government. And such surrender is, by the act, made as essential as the relinquishment of all claims to the land.

The person who made the entry, his heirs or assigns, voluntarily assigning, whether immediate or mediate, would presumably
11 have the duplicate receipt, but the purchaser at the forced sale would presumably not have it. This prerequisite makes it very evident that purchasers at judicial sale are not his assigns of the land within the purview of the act.

The question is asked would not a purchaser under a quitclaim deed be entitled to recover under this act? It may be conceded that he would; a quitclaim deed is a voluntary transfer. It is said "the purchaser at a sheriff's sale acquires all the right, title, and interest of the judgment debtor." This is granted so far as the land is concerned. But it by no means follows that a purchaser acquires a privilege which is granted to the debtor and "his heirs or assigns."

The doctrine of *caveat emptor*, as we have said in the original opinion, applies to judicial sales. The purchaser at such sale gets the only title or estate in the land which the debtor may have. He does not get a privilege which is given only to the debtor, his heirs or assigns, or his grantee or assigns.

The phrase "his heirs or assigns" was evidently used in the act as including only such persons as would have in their possession the duplicate receipt to surrender. The language of the act limits the privilege to such transferees of the lands as are his transferees holding the duplicate receipt and prepared to surrender it.

There is no authority to import into the act the phrase "transferees by operation of law," transferees without and against his consent, or any other words to construe the force and effect of the requirement for the surrender of the duplicate receipt. This clause requiring the surrender of the duplicate receipt cannot be ignored. It makes this case analogous to Doe *v.* Bevant (3 M. and S., 353) and Breading *v.* Boggs (20 Penn. Stat., 33).

It is not necessary to pass upon the rights of any person but the claimant. Under the act of 1880 a privilege is granted by the defendants, and no one is entitled to claim the entry money unless upon a due consideration of all the provisions of the statute, ignoring no one of them, it appears from a correct construction that the claimant comes within the purview of the provisions of the law.

It is possible that for a mere pittance the purchaser at a forced judicial sale might succeed in getting possession of the duplicate receipt, but this possibility cannot affect the construction of the act. The question will always be, Did the claimant really acquire his title or claim to the land by a voluntary sale of the land? Did the decedent purchase a right as against the United States, or simply the land, with whatever title the judgment creditor had in the title to the land?

Suppose the entryman had, on the day before the rendition of the judgment or the sale under the execution, sold and transferred to a third person, conveying to such person all right and title to the land, and the deed had not been placed on record on the day of the sale, and the judgment creditor had neither constructive nor actual notice of such sale or transfer, can it be said that as against the in-

nocent purchaser from the entryman the purchaser at the sale would take, under the act, as against such purchaser from the original entryman?

Even though in a proper case under the general jurisdiction of the court an action for money had and received may be maintained, it is incumbent upon the plaintiff to show that he is entitled to recover by the performance of all the conditions annexed and incident to the subject-matter of his claim. If the liability of the Government depends upon a condition precedent with reference to the subject-matter of the claim, the plaintiff must allege and prove the performance of and compliance with such condition before he is entitled to recover. The statute in this case having annexed a condition to the right of the claimant to recover, he must show performance of that condition, as his remedy is predicated upon and his right to recover is determined by the terms of the law.

For the reasons above stated the motion for a new trial is overruled.

12 VI.—*Application for and Allowance of Appeal.*

J. HENRIETTA HOFFELD, Executrix of the Estate of Rudolph Hoffeld, Deceased, Claimant,
vs.
THE UNITED STATES, Defendant. } No. 21872.

Now comes the claimant, by Andrews & Andrews, her attorneys, and prays the court for allowance of an appeal from the judgment entered herein on the 21st day of January, 1901, in favor of the defendant, to the Supreme Court of the United States, and as grounds therefor assigns the following errors:

1. In holding that, because the claimant's testator purchased the land, on account of which repayment is claimed, at a judicial sale, he was not an assign of the entrymen, within the purview of section 2 of the act of June 16, 1880, relating to the repayment of certain purchase-money, fees and commissions paid on void entries, (21 Stats., 287).

2. In not holding that the claimant was entitled to recover under section 2 of said act of June 16, 1880.

13 3. In finding as a fact that "neither the entrymen nor their assigns took any action in the premises, and accordingly the entry was canceled by the General Land Office on January 24, 1895," when said finding of fact is entirely immaterial and irrelevant.

4. In not rendering judgment for the claimant in the sum of three thousand, two hundred dollars.

ANDREWS & ANDREWS,
Attorneys for Claimant.

Filed April 15, 1901.

At a Court of Claims held in the city of Washington it was ordered that the foregoing application for appeal be allowed as prayed for.

BY THE COURT.

April 15, 1901.

14 In the Court of Claims.

J. HENRIETTA HOFFELD, Executrix of Rudolph Hoffeld, Deceased,
vs.
THE UNITED STATES. } No. 21872.

I John Randolph assistant clerk of the Court of Claims hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims. In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 11th day of May, A. D. 1901

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 18,151. Court of Claims. Term No. 318. J. Henrietta Hoffeld, executrix of Rudolph Hoffeld, deceased, appellant, *vs.* The United States. Filed May 11th, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

J. HENRIETTA HOFFELD, EXECUTRIX, ETC., *v.* THE UNITED STATES. } No. 318.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO ADVANCE.

The Solicitor-General moves the court to advance this case so that it may be heard early in the term.

The case involves the construction of the repayment act of June 16, 1880 (21 Stat., 287), the administration of which is committed to the Department of the Interior.

It is a class case. The questions involved are very important to that Department because of the large number of claims for repayment in which they arise, and the Secretary of the Interior has recently informed this Department that it would be of great assistance to his Department if these questions could be determined by the court at as early a date as will meet its convenience.

The counsel for the appellant concur in this motion.

JOHN K. RICHARDS,
Solicitor-General.

O

8710—01

No. 318.

Brf. of Andrews for Appt.

FILED
APR 7 1902
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Apr. 7, 1902.

No. 318.

J. HENRIETTA HOFFELD, *Executrix of the Estate of* RUDOLPH HOFFELD, *Deceased, Plaintiff,*

vs.

THE UNITED STATES.

For Repayment of $3,200 Under the Act of June 16, 1880. 21 Stats. 287.

Appeal by the Plaintiff from the Decision of the Court of Claims of January 21, 1901.

BRIEF FOR THE PLAINTIFF.

ANDREWS & ANDREWS,
Attorneys for Plaintiff.

LAW REPORTER PRINT.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 318.

J. HENRIETTA HOFFELD, *Executrix of the Estate of* RUDOLPH HOFFELD, *Deceased, Plaintiff,*

vs.

THE UNITED STATES.

For Repayment of $3,200 Under the Act of June 16, 1880. 21 Stats. 287.

Appeal by the Plaintiff from the Decision of the Court of Claims of January 21, 1901.

BRIEF FOR THE PLAINTIFF.

STATEMENT OF THE CASE.

May 28, 1886, Harry Jones, J. L. Cole, Chas. L. Weaver and Samy Perri, by William Hinds, their attorney in fact, purchased from the United States the N. E. ¼ Sec., 35 Twp. 14 S., R. 87 W. of the 6th P. M., as entry No. 13, at the United States land office at Gunnison, Colo., paying therefor the sum of $3,200. (Rec. p. 3.)

May 29, 1886, the aforesaid purchasers conveyed said land by William Hinds, their attorney in fact, to the Ohio Creek Anthracite Coal Company for a recited consideration aggregating $4,450. (Rec. p. 4.)

August 29, 1887, a writ of attachment issued out of the county court of Gunnison County, Colorado, in a suit wherein Asenath L. Hinds was plaintiff and the Ohio Creek

Anthracite Coal Company was defendant, and levied upon the aforesaid tract of land, as well as other land belonging to the said company. (Rec. p. 4.)

August 23, 1887, a like attachment was issued out of the district court of Arapahoe County, Colorado, in a suit wherein the Hendric and Balthoff Manufacturing Company was plaintiff and the Ohio Creek Anthracite Coal Company was defendant, and levied upon the aforesaid tract of land, as well as other land belonging to the defendant company. (Rec. p. 4)

November 10, 1887, the aforesaid tract of land and other property were sold by the sheriff of Arapahoe County, Colorado, to Rudolph Hoffeld for a recited consideration of $75, on account of the aforesaid writ of attachment in the suit wherein the Hendric and Balthoff Manufacturing Company was plaintiff and the Ohio Creek Anthracite Coal Company was defendant. (Rec. p. 4)

The affidavit required by section 32 of the Coal Land Regulations, in which it was required to be stated *inter alia* that the entry was made for the benefit of the entryman, was not made by the several entrymen, as required by said regulation, but by the said William Hinds as their attorney in fact. But notwithstanding this defect, the local land officials allowed the entry and accepted the purchase money. Subsequently, on April 12, 1888, this affidavit was held to be insufficient by the General Land Office, and the local land offices were directed to notify the claimants to that effect. No report having been received from the local offices of their action under said instructions, such report was called for by the General Land Office August 11, 1894. (Rec. p. 3.)

August 27, 1894, the local officers reported that two of the entrymen were reported dead; that Perri and Cole were no longer residents of Colorado; and that their whereabouts could not be ascertained. Whereupon the entry was held for cancelation by the General Land Office October 4, 1894, and canceled by it January 24, 1895. (Rec. p.p. 3+4)

June 10, 1897, Rudolph Hoffeld by his attorney in fact

made application for repayment of the purchase money paid on said land under the provisions of the act of June 16, 1880 (21 Stats. 287). He also filed an affidavit showing the loss of the duplicate receipt and reconveyed the above described land to the United States. Subsequently he died and J. Henrietta Hoffeld, the plaintiff herein, was appointed his ~~administratrix~~ executrix. The application was denied on November 4, 1897, and again refused on appeal to the Secretary of the Interior on December 11, 1899, he claiming that said application did not come within the provisions of the act of June 16, 1880, for the reason that the entry could be confirmed. (Rec. p.p. 4 & 5)

June 5, 1900, plaintiff commenced an action against the United States for said $3,200 by filing her petition in the Court of Claims. (Rec. p. 1.)

January 21, 1901, the Court of Claims dismissed the petition of the plaintiff on the ground that a purchaser at a judicial sale is not an assign within the purview of the act of June 16, 1880. (Rec. p. 5.) From which decision the plaintiff appealed to this court, assigning as grounds therefor the following errors:

1. In holding that, because the plaintiff's testator purchased the land, on account of which repayment is claimed, at a judicial sale, he was not an assign of the entrymen, within the purview of section 2 of the act of June 16, 1880, relating to the repayment of certain purchase money, fees and commissions paid on void entries (21 Stats. 287).

2. In not holding that the plaintiff was entitled to recover under section 2 of said act of June 16, 1880.

3. In finding as a fact that "neither the entrymen nor their assigns took any action in the premises, and accordingly the entry was canceled by the General Land Office on January 24, 1895," when said finding of fact is entirely immaterial and irrelevant.

4. In not rendering judgment for the plaintiff in the sum of three thousand two hundred dollars. (Rec. p. 10.)

In support of which appeal we submit the following:

ARGUMENT.

I.

The entry herein involved, was canceled by the Commissioner of the General Land Office, because it was allowed upon an insufficient affidavit. Its allowance was in violation of paragraph 32 of the circular of the coal land law. The affidavit was made by the attorney in fact instead of the entryman as required by that regulation. Hence the entry was erroneously allowed. The defect in the proof could not be cured, because some of the entrymen were dead and the others could not be found, therefore the entry could not be confirmed, and consequently the plaintiff is entitled to repayment under section 2 of the act of June 16, 1880, (21 Stats. 287), which reads in part as follows:

> "In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, *or where, from any cause, the entry has been erroneously allowed and can not be confirmed*, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

According to the construction of this act by the Secretary of the Interior repayment is allowed thereunder, when the local officers allow an entry upon insufficient proof, and their decision is subsequently reversed by the Commissioner of the General Land Office, and the entry canceled. In Duthan B. Snody, 1 Land Decisions, 532, the Secretary of the Interior held that where "*from any cause*" the entry has

been "erroneously allowed," repayment should be made. On p. 533 in the same decision it is said:

> "The fact that the acts of the entryman have contributed to or caused the erroneous entry ought not, under the statute, to deprive him of the remedy in cases where he has acted in good faith."

In George J. Ruskridge, 7 Land Decisions, 509, it is held that if an entry was innocently procured and allowed, under mistaken belief, entertained by the entryman and the officer allowing the same, that the facts in the case showed a sufficient compliance with the law as to ~~evidence~~ residence, when in truth such compliance is not shown, then the entry was "erroneously allowed" and the entryman is entitled to repayment on the cancelation of his entry.

The payment by the entrymen in the case at bar upon a final affidavit made by the attorney in fact, and the allowance of the entry by the land officials upon this affidavit, was the result of a mistaken belief entertained by both the entrymen and the land officers, hence the entry was "erroneously allowed" and the plaintiff is entitled to repayment in the light of the decision last cited *supra*. See, also, William Waible, 20 Land Decisions, 374. In J. H. Thompson, 10 Land Decisions, 34, it is held, where it is impracticable for the claimant to comply with an order requiring new final proof to be made, and good faith is apparent, repayment may be allowed.

The good faith of neither the entrymen nor assigns has been questioned in the findings of fact by the Court of Claims in the case at bar, hence, if the applicant in the case cited was entitled to repayment *a fortiori* is the claimant in the case at bar entitled thereto, as it was *impossible* to comply with the requirement of the Commissioner of the General Land Office in the case at bar and only *impracticable* in the case cited. not requires to perform physical impossibility. U.S. v. [illegible]

In George M. Dwyer, 26 Land Decisions, 284, it was held that an entry is "erroneously allowed" within the

meaning of the statute providing for repayment, if the General Land Office, in acting on the proofs accepted by the local office, finds said proof insufficient, and cancels the entry for that reason.

This was what was done in the case at bar and hence the entry was "erroneously allowed."

The construction given to the act of June 16, 1880, by the Secretary of the Interior, in the decisions cited *supra*, is entitled to great weight.

> Hastings and Dakota RR. Co. *vs.* Whitney, 132 U. S. 366.

In the case at bar the assignee was divested of his title by the act of the United States, and it would be unjust for the Government to retain both the land and money, hence, the statute provides for a refund of the money. The holding of the Secretary of the Interior that the entry could be confirmed in the case at bar was in conflict with his own regulations, the facts, and his previous decisions. The rule required the affidavit to be made by the original entrymen; they were dead or not to be found, and hence, this rule could not be complied with, without which it could not be confirmed. The Secretary only held thus in one other case prior to the case at bar, to wit, The Anthracite Mesa Coal Mining Co., 28 L. D. 551, which was overruled by the Court of Claims in May, 1900.

The amount of recovery is not fixed by the amount paid by the assignee to the assignor, but by the amount paid to the Government by the entryman, as the act of June 16, 1880, provides for the repayment of *purchase* money paid the Government, and hence the amount paid by the assignee is immaterial. Although a nominal consideration only is recited in the sheriff's deed to Hoffeld, the real consideration was much more than the amount paid the Government, but believing that plaintiff is only entitled to judgment for the amount paid the Government, no more and no less, we

did not deem it necessary to make proof of this fact, as we concede plaintiff is only entitled to recover $3,200.

II.

The Court of Claims does not hold that the plaintiff is not entitled to repayment because the entry was not erroneously allowed," or because "it could be confirmed," but in the case of the Anthracite Mesa Coal Co., to which we referred, *supra*, a case in which the facts were analogous to those in the case at bar, except as to the mode of assignment, it gave judgment for the complainant. Thus, in effect, holding that the facts in the case at bar entitled the plaintiff to a judgment, if the plaintiff had acquired title as assignee in a different manner. But it held that inasmuch as Rudolph Hoffeld purchased the land at a judicial sale he was not an assignee within the purview of the second section of the act of June 16, 1880.

III.

The word "assigns" in the second section of the act of June 16, 1880 (21 Stats. 287), means the grantees of the land.

(A.) After entry made the United States parts with the complete title to the land included therein, which vests in the entryman.

This court in the Wisconsin Central Railroad Company *vs.* Price County et al., 133 U. S. 496, held: After public lands have been entered at the land office and a certificate of entry obtained they are private property, the Government agreeing to make a conveyance as soon as it can, and in the meantime *holding the naked legal fee in trust for the purchaser*, who has the equitable title. The court in that case, speaking through Mr. Justice Field, quoted with approval the case of Carroll *vs.* Safford, 3 How. 441, and said, *inter alia*:

> "It is said the fee is not in the purchaser, but in the United States until the patent shall be issued.

This is so, technically, at law, but not in equity. The land in the hands of the purchaser is *real estate, descends to his heirs*, and does not go to his executors or administrators."

Again:

"Lands which have been sold by the United States can in no sense be called the property of the United States. *They are no more the property of the United States than lands patented.*"

In Hastings and Dakota RR. Co. *vs.* Whitney, 132 U. S. 361, it is held that after entry and before patent the land is private property. The court say:

"The fact that such an entry may not be confirmed by the land office on account of any alleged defect therein, or may be canceled or declared forfeited on account of non-compliance with the law, or even declared void, after patent has issued, on account of fraud, in a direct proceeding for that purpose in the courts, is an incident inherent in all entries of the public lands."

Again, on pages 363–4:

"But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards canceled on account of these defects by the Commissioner, or on appeal, by the Secretary of the Interior; or, as is often the practice, the entry must be suspended, a hearing ordered and the party notified to show by supplemental proof a full compliance with the requirements of the department; and on failure to do so the entry may then be canceled. But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. *So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from*

> *the public* domain, and therefore precludes it from subsequent grants."

In the case at bar, the legality of the entry of Jones et al. had been passed upon by the officials of the United States Land Office at Gunnison, Colo., and hence it segregated the land included in said entry from the public domain, *i. e.*, took title out of the United States and vested it in the entrymen, and continued said title in them and their grantees, until more than six years after Hoffeld purchased the land at the judicial sale.

That the title vests in the entryman to the land included in the entry, see Carroll *vs.* Safford, 3 How. 460–1; Witherspoon *vs.* Duncan, 4 Wall. 219, and Deffeback *vs.* Hawke, 115 U. S. 405.

It thus appears that while the United States holds the *naked legal title* as trustee for the entryman, *the ownership of the land is in the entryman for all purposes* as long as the entry remains intact.

(B) The entryman having complete title to, and ownership of the land included in his entry has a right to transfer or assign it before the patent is issued. Myers *vs.* Croft, 13 Wall. 291.

His title to, and property in the land can be sold under an execution. Landes *vs.* Brant, 10 How. 371.

(C) The transferees, grantees or assigns of the land are the "assigns" named in that clause of the second section of the act of June 16, 1880, which reads as follows:

> "The money paid therefor shall be repaid to the person who made such entry, or to his heirs or '*assigns.*'"

Section 4 of the act of June 16, 1880 (21 Stats. 287), provides *inter alia*:

> "The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary

instructions to carry the provisions of this act into effect."

In pursuance of this express authority of Congress, the Commissioner of the General Land Office, on August 6, 1880, issued instructions, which were approved by the Secretary of the Interior, the ninth clause of which reads as follows:

> "Those persons are assignees, within the meaning of the statute authorizing the repayment of purchase money, who purchase the *land* after the entries thereof are completed, and take assignments of the title under such entries prior to complete cancelation thereof when the entries fail of confirmation for reasons contemplated by the law. To construe said statute so as to recognize the assignment or transfer of the *mere* claim against the United States for repayment of purchase money, or fees and commissions, disconnected from a sale of the land or attempted transfer of title thereto, would be against the settled policy of section 3477 of the Revised Statutes." (Copp's Land Owner Vol. 7. p. 91.)

In the circular of the General Land Office of 1899, p. 106 it is said:

> "*Assignees of land* who purchase after entry are, in general, deemed entitled to receive the repayment when the lands are found to have been erroneously sold by the Government."

The Commissioner of the General Land Office and the Secretary of the Interior have continued to hold that the word "*assigns*" in said act means *grantees of the land*, from the passage of the act up to the present time.

This uniform construction by this Department justifies this court in accepting it.

Edwards *vs.* Darby, 12 Wheat. 210.
United States *vs.* Philbrick, 120 U. S. 52–59.
Robertson *vs.* Downey, 127 U. S. 607, 613, and
The United States *vs.* Healey, 160 U. S. 136.

If the uniform interpretation of a statute by a Department should be accepted, *a fortiori* should it be accepted when made in compliance with an express authority given by Congress in the act construed.

The First Comptroller of the Treasury held that the word "assigns" in that act meant the assignees of the land.

> 2 Lawrence, 264–6.
> See, also, Ely *vs.* Land Commissioner, 49 Mich. 21.

The language of the act itself clearly shows that the grantees of the land are meant by the word "assigns." The second section provides *inter alia:*

> "Upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claim to said *land,*" etc.

That is, the applicant must do this as a condition precedent to his receiving the repayment of the purchase money. The departmental regulation to carry this provision into effect reads as follows:

> "The reconveyance to the United States must conform in every particular to the laws of the State or Territory in which the land is located relative to *transfers of real property.*"
>
> Circular of the General Land Office of 1899, p. 106.

It is clear that Congress would not have required the assignee of a *claim* to relinquish the *land.* This statute is too plain to need comment.

The fact that the construction heretofore given to the word "assigns" has become a rule of property is a cogent reason for continuing and maintaining it.

We submit that the conclusion can not be escaped that the "assigns" named by Congress in that act are the grantees of the land.

IV.

The fact that an entryman has complete title to the land; *that he has a right to sell it* before patent, and that the purchaser or assign is entitled to repayment, clearly gives the right of repayment to a purchaser at a judicial sale. Land included in an entry is the subject of sale under an execution.

Landes *vs.* Brant, 10 How. 371.

In that case such sale was authorized by State statute. The sale to Hoffeld in the case at bar was authorized by State statute.

See Mill's Annotated Statutes of Colorado of 1891, Secs. 3606, 3608, 3613 and 3617.

The land being subject to execution sale, all estate therein was transferred to Hoffeld by operation of law.

Remington *vs.* Linthicum, 14 Pet. 92.

Not only the land, but all covenants of title passed to him by the sheriff's deed.

Rorer on Judicial Sales, Sec. 777.

A purchaser at a judicial sale of land before patent has been issued acquires the same title he would acquire by a quit-claim deed from the judgment debtor.

Landes *vs.* Brant, 10 How. 371.

If a purchaser under a quit-claim deed is an assign within the meaning of the act of June 16, 1880 (and this is not disputed by the Court of Claims), under the authority last cited, *supra*, a purchaser at a judicial sale would be such assign.

When Hoffeld purchased at the judicial sale, November 10, 1887, the entry of Jones et al., made May 28, 1886, and

conveyed by them, May 29, 1886, to the Ohio Creek Anthracite Coal Company, was intact and the title was good, and remained so until January 24, 1895, the date of the cancelation of the entry.

> Hastings and Dakota RR. Co. *vs.* Whitney, 132 U. S. 361.

Hoffeld having title to the land at the date of the cancelation of the entry is the *assign* entitled to repayment.

> "The applicant must make affidavit that he has not transferred or otherwise encumbered the title to the land and that the same has not become a matter of record."
>
> Circular of the General Land Office of 1899, p. 105.

It is apparent that such affidavit can only be made by the owner of the land at the date of the cancelation of the entry.

The Court of Claims, in its decision of January 21, 1901, says:

> "The right to reimbursement by the terms of the statute is confined to the person who made the entry, his heirs or *assigns*, and it does not inure to, and is not made applicable to any other person. Whatever may be the rights of the original entrymen, can it be said that the purchaser at a judicial sale is in such privity of contract or statutory obligation as to entitle him to recover on failure of title because of the cancelation of the entry? The doctrine of *caveat emptor* applies in all its force to a judicial sale, and the purchaser at such a sale buys the title or estate which the defendants in execution may have without the rights and benefits of covenants of warranty which inure to the ordinary purchaser. 15 Ill. 395; 25 Ala. 626; 2 Ohio N. S. 36. The claim of the plaintiff must be determined and measured by the statute which authorizes the refunding of the money. *The claim is purely of statutory obligation without any of the elements of a contract*

or covenant, and must be brought clearly within the terms of the statute before any recovery can be had." (Rec. p.p. 6+7)

We concur in that part of the decision which holds the plaintiff's right must be measured by the statute; but we most respectfully submit that the fact that a purchaser at a judicial sale buys *caveat emptor* in no wise affects his right to the benefit of said act. No provision can be found in that act which either in express terms or by implication limits the right of repayment to the grantees in a warranty deed. Neither the letter nor spirit of that act warrants any such construction. Such an interpretation is not only not warranted either by the language or the purpose of the act, but would be an unjust discrimination against purchasers who did not derive their title through a warranty deed. If the equities of the purchasers were to be considered in construing the word *assigns*, it would be more equitable to include purchasers at judicial sales and exclude purchasers under a warranty deed, because the latter would have a remedy on the covenants of the deed and the former would not.

Section 10 of the Regulations and Instructions of the Commissioner of the General Land Office of August 6, 1880, relating to this act, provides (Copp's Land Owner, Vol. 7, p. 91):

> "Where applications are made by assignees, the applicants must show their right to repayment by furnishing properly authenticated abstracts of title, or the original deeds or instruments of assignment, or certified copies thereof, *and also show by affidavit or otherwise that they have not been indemnified by their grantors or assignors for the failure of title*, and that a title has not been perfected in them by their grantors through other sources."

This regulation has been in force since August 6, 1880, or during the entire time the Land Department has admin-

istered this act. This regulation negatives the position of the Court of Claims, that a purchaser at a judicial sale is not entitled to repayment because the doctrine of *caveat emptor* applies.

The regulation specially provides for paying those not indemnified.

We admit, however, that all assigns are included, without regard to the character of the sale or the mode of conveyance, and that this regulation does not exclude purchasers under warranty deeds, but refers only to special indemnity.

Recognizing the injustice of the Government retaining both the land and the money, Congress provided that where title to the land was resumed by the Government, the money paid therefor should be repaid to the entryman, and where the land had been assigned the *assign* was entitled thereto, evidently because it would be unjust to allow the entryman to retain the consideration paid him by the assign and also to receive the repayment from the Government. A purchaser at a judicial sale, where the entry is canceled, has no right of action against his grantor, because the doctrine of *caveat emptor* applies; but he has a right of action against the Government, because it is given to him by the act of June 16, 1880, to recover *the amount the entryman paid the Government*—not the amount he paid his assignor. The purchaser under a warranty deed can not maintain an action against the Government on the covenants of the deed.

This right would inure to him only against his grantor, whose liability would be lessened by the amount refunded to the grantee by the Government, but his right against the United States is acquired by the act of June 16, 1880, just as the purchaser at the judicial sale acquires his right.

In both cases the land is bought, in both cases after sale the title fails, and in both cases the statutory right of repayment is based upon failure of title.

In the decision of April 8, 1901, denying the motion for a new trial the court say:

> "A grant or assignment primarily implies a grant or an assignor, and not the mere transfer of title by operation of law." (Rec. p. 8)

This court, in Goodman *vs.* Niblack, 102 U. S. p. 500, in effect held that the use of the words "*transfer or assign*" was broad enough in meaning to include an assignment by operation of law as well as by the act of the party unless from the purpose of the act a different meaning could be gathered.

In speaking of the provisions of section 3477 R. S., forbidding the assignment of claims against the United States, the court said:

> "Both these considerations as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the Government, and not the parties to the assignment. Erwin *vs.* United States, supra, decided at the same term as Spofford *vs.* Kirk, is suggestive on this point. It was there held that the claim of a bankrupt against the United States passed by the assignment in the bankruptcy proceeding to his assignee, and that the latter, and not the original claimant was the proper person to sue in the Court of Claims. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aimed, said the court. The language of the statute 'all *transfers and assignment* of any claim upon the United States, or any part thereof, or any interest therein *is broad enough* [if such were the purpose of Congress] *to include transfers by operation of law, or in bankruptcy, and we said it did not include one by will.*' The obvious reason of this is that there can be no purpose in such cases to harrass the Government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of creditors, which is made by an insolvent debtor of *all* his

> effects, which must, if it be honest, include a claim against the Government, differ from the assignment which is made in bankruptcy? There can be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the Government can be embarrassed by such an assignment. The claim is not specifically mentioned, and and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of *all* debts. We can not believe that such a meritorious act as this comes within the evil Congress sought to suppress by the act of 1853."

It thus appears that this court regards the word *assigns broad enough to include assigns by operation of law* unless from the nature of the act the intention can be gathered to limit it to *voluntary* assigns. In the case cited it was limited to voluntary assigns because it was not necessary to extend it to assigns by operation of law to suppress the evil, and also for the reason that to do so, would work an unneccessary hardship upon the latter class of *assigns*. In the light of the doctrine announced in the case last cited *supra*, the word *assigns* in the act of June 16, 1880, is broad enough to include assigns by operation of law, as well as by the act of the parties and it will be so construed unless it is clear that Congress intended to limit it to assigns by the act of the parties. It can not be contended that it would be necessary to so limit it, because to do so would be sufficient to suppress any evil, as there is no evil to suppress. It can not be contended that it should be so construed to give it an equitable construction, as the greater equities would be possessed, in all probability, by the assigns by operation of law, and hence it would be inequitable to so construe it. It contains no prohibitory clause that demands such a construction in order to save any rights, and it imposes no obligation upon the assign that requires such a construction to protect him. No such construction is necessary to protect the Gov-

ernment from imposition. The rights of the Government are as fully guarded in giving the *broad* as the *narrow* meaning to the word. The purpose of Congress to refund the purchase money to *all* owners of land to which the Government has resumed title, is only carried out by giving the *broad* meaning to the word *assign*. Justice and equity are better subserved and promoted by *including* than *excluding assigns by operation of law*. No reason appearing for limiting the word "*assigns*" used in the act of June 16, 1880, to voluntary assigns, either from the purpose of the act or the condition of the assigns, it is conclusive, in the light of the authority last cited, *supra*, that it should be read to include all assigns—by voluntary act—and operation of law.

There is no authority to *import into this statute the word voluntary*.

In Newhall *vs.* Sanger, 92 U. S. 765, the court say:

> "This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means *lawfully* claimed, but there is no authority to import a word into a statute to change its meaning."

It is conclusive that the word *assigns* in the act of June 16, 1880, taken in its ordinary acceptation as well as from the undoubted intention of Congress, should include both assigns by the act of the parties and *by operation of law*.

The Court of Claims in the decision of April 8, 1901, again say:

> "The second section of the act provides as follows: 'Upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land,' etc.
>
> "Does not this ~~patent~~ clause clearly indicate that Congress did not intend to extend the meaning of 'his assigns' so as to include a purchaser at an involuntary, forced, or judicial sale? Such purchaser would not have the 'duplicate receipt' to surrender to the Government. (Rec. p. 8.)

"And such surrender is, by the act, made as essential as the relinquishment of all claims to the land. The person who made the entry, his heirs or assigns, voluntarily assigning, whether immediate or mediate, would presumably have the duplicate receipt, but the purchaser at the forced sale would presumably not have it. This prerequisite makes it very evident that purchasers at judicial sales are not his assigns of the land within the purview of the act."

Again:

"The phrase 'his heirs or assigns' was evidently used in the act as including only such persons as would have in their possession the duplicate receipt to surrender. The language of the act limits the privilege to such transferees of the lands as are his transferees holding the duplicate receipt and prepared to surrender it." (Rec. p.p. 8-9.)

Whether purchasers at judicial sales ordinarily receive the duplicate receipts or not we have no means of learning at this time, but we do know that Hoffeld had the duplicate receipt in the case at bar, and that he did not surrender it because it was destroyed by fire, proof of which was duly made according to the requirements of the department. See findings of fact by the Court of Claims. The departmental regulations require proof of loss or destruction if the receipt can not be surrendered. This certainly is a sufficient compliance with the law where the duplicate receipt is lost or destroyed. And we apprehend, if for any reason it appeared that the applicant was wrongfully deprived of the possession of the duplicate receipt, proof of that fact would entitle him to repayment.

When Hoffeld purchased the land at the judicial sale he was entitled to the duplicate receipt. It was a muniment of his title. If the entry had not been canceled he was entitled to the patent. The title passing out of the Government by it would inure only to his benefit. He only would have an interest in its issuance, but before he could

procure such patent from the Government he must surrender the duplicate receipt or prove its loss or destruction, according to the regulations of the Land Department. Would the court hold that because the judgment debtor, who, having no further interest in the land, refused to deliver the duplicate receipt, the purchaser at the judicial sale would lose his land? Would not proof of the refusal to deliver such receipt by the said judgment debtor be sufficient proof of loss to justify the delivery of the patent to such purchaser? Would not a remedy be afforded by the courts for him to recover such receipt in an action of replevin from said judgment debtor? But, in any event, proof of his failure to obtain the receipt after exhausting his remedy would be sufficient to entitle him to the patent and if the entry was canceled, to repayment. This same difficulty might be encountered by an assign claiming under a voluntary deed. Suppose by inadvertence or by the ~~continuance~~ connivance of the grantor in a voluntary assignment the duplicate receipt was not delivered, and subsequently the entry was canceled, whereupon said grantor refused to deliver the duplicate receipt. The grantee, in such an event, would have no better means of securing said receipt than would the purchaser at a judicial sale. Would it be contended for one moment that such grantee would be deprived of his patent or repayment simply because he was unable, after exhausting all of his remedies, to procure said receipt? Certainly not.

The court in arguing that the possibility that the purchaser at a judicial sale might not have the duplicate receipt is an evidence that such purchasers were not entitled to the benefits of the act of June 16, 1880, overlooked the fact that this argument led them into a difficulty from which it is impossible to be extricated, without a clear violation of the plain and express terms of that act.

The court by denying the right of repayment to the purchaser at the judicial sale, left that right in the judgment

debtor. If that sale was not an assignment within the purview of the act certainly the right of repayment remained in the debtor.

The act of June 16, 1880, provides that the applicant for repayment must relinquish all claim to the *land*, and the departmental regulation thereunder requires a deed duly executed therefor according to the laws of the State or Territory in which the land is located. When the land herein involved was sold at judicial sale all title of the judgment debtor thereto passed out of it into Hoffeld, if the proceedings were in all respects according to law and this is not questioned. How then could the judgment debtor reconvey this property to the United States? Is it not a fact that the only person who could deed this property to the United States was Hoffeld? He did so reconvey and he is the only party that the land department required to reconvey. He was not only the only party that could convey and that was required to convey, but his conveyance alone would be of any benefit to the United States, as the deed of any other party could convey no title to the Government. It is apparent that the loss or absence of a duplicate receipt could be easily explained and accounted for by the party entitled thereto, but the fact that title had passed out of the applicant would prevent him from complying with the express provisions of the act of June 16, 1880, and no explanation could cure such defect. The applicant is required by the Department to furnish an abstract of title, to show that title came to him and did not pass out of him. This was done by Hoffeld in the case at bar, but could not have been done by the judgment debtor. The conclusion is irresistible that the "*assigns*" meant in the act of June 16, 1880, include those who acquire title by a warranty, quit claim, sheriff's or any other deed that would convey the title of the entryman to the land, and who owned the land at the date of the cancelation of the entry or the time when the United States resumed title to the land.

Again, in the decision of April 8, 1901, the court say:

> "Suppose the entryman had, on the day before the rendition of the judgment or the sale under the execution, sold and transferred to a third person, conveying to such person all right and title to the land, and the deed had not been placed on record on the day of the sale, and the judgment creditor had neither constructive nor actual notice of such sale or transfer, can it be said that as against the innocent purchaser from the entryman the purchaser at the sale would take, under the act, as against such purchaser from the original entryman?" (Rec. p. p. 9 + 10.)

We concede that if an entryman made two conveyances for the same tract, that the assignee in that conveyance which carried the title would be the assign within the purview of the act of June 16, 1880. We can not, however, conceive of how the case supposed could in anywise affect the question, as to whether the purchaser at a judicial sale is an assign within the purview of that act. Of course, if title passes out of the judgment debtor before judgment, a purchaser at a judicial sale might acquire no title to the land, and hence would not be the assign entitled to repayment. But this is not the fact in the case at bar. It is not contended that the land herein involved had been sold to any other party or parties at any time either before or after either the judgment or sale; and hence the hypothetical case has no application to the case at bar. If land was sold twice by a warranty deed, the party receiving the title would evidently be entitled to repayment. The mere fact that one was a warranty and the other a sheriff's deed would give the purchaser who did or did not receive the title no less or greater rights against the Government under one form of deed or sale than under the other. The lawful sale under either deed would convey all the right, title and interest the grantor possessed, which is all that is required to entitle the assign to repayment under that act.

The Court of Claims cites Breading *vs.* Boggs, 20 Penna.

State 33, to support its holding that assigns by operation of law were not included in the word "assigns" in the act of June 16, 1880. In that case a judgment was obtained against a firm in favor of a trustee for the benefit of certain named creditors. This judgment was attacked by a subsequent judgment creditor on the ground that it was a violation of the act of 17th April, 1843 (Sess. Laws, Penn. of 1843, p. 273), and the proviso of the 4th section of the act of 16th of April, 1849, (Sess. Laws, Penn. 1849, p. 664) forbidding debtors unable to pay their debts from preferring creditors. The court in that case held that the judgment was not an assignment. An assignment for the *benefit of creditors* is commonly understood to mean a *voluntary* assignment.

Am. & Eng. Ency. of Law, (2d Ed.) Vol. 3, p. 6, and authorities cited.

Said act of the 17th of April, 1843, provides that such assignments shall be subject in all respects to the laws in force relative to *voluntary* assignments. In that case the interpretation of the word was put upon its use in an act forbidding a preference of creditors by the debtor. A judgment obtained by the diligence of a part of the creditors was not the expression of a preference by the debtor, but a preference by operation of law, which was not forbidden by the statute, and therefore that judgment was held not to be an assignment within the meaning of that act, *i. e.*, it was not a *voluntary* assignment. Nor was the execution of the warrant of attorney to confess that judgment and assignment within the purview of the act of the 17th of April, 1843, because it was no attempt to transfer *all* of the property of the debtor which was necessary in order to be an assignment within the meaning of that act.

Worman *vs.* Wolfersberger's Executors, 19 Penn. State 61.

But the word assigns in the act of June 16, 1880, was used in no such sense. There was no prohibition in that act against *voluntary* assignments which would require its meaning to be limited to the act of the parties. On the contrary, the right to assign land covered by an entry has been recognized by this court both as to *voluntary* assignments (Myers *vs.* Croft, 13 Wall. 291), and to assignments by *operation of law* (Landes *vs.* Brant, 10 How. 371.) This court has also defined the word "assigns," when unlimited by either express words or the manifest intention of Congress to be *broad* enough to include both *assigns by operation of law* and by the act of the parties. Goodman *vs.* Niblack, 102 U. S. 560, cited *supra.*

The case of Doe *vs.* Bevan, 3 Maule and Selwyn, p. 353, cited by the Court of Claims, involved a lease wherein the lessee covenanted that he would not assign. The lease was sold by the assignee in bankruptcy of the lessee. The court held that this was not a breach of the covenant as it was an assignment in law. The reason for this decision must be found in the fact that the lessee should not be held responsible for any act other than *his own*, unless he by express terms bound himself therefor. To have given the word assigns in that instrument its broadest meaning would have undoubtedly worked a great hardship upon the lessee or his creditors. But to hold that the word "assigns" in the act of June 16, 1880, includes assigns by operation of law imposes no hardship upon anyone. It puts all assigns upon an equality, giving to each a return of the purchase money where he loses the land. It gives the purchasers at a judicial sale the same rights it gives to the purchasers at voluntary sales. It was the manifest purpose of Congress to reimburse such grantees or assigns for the loss incurred by them by reason of the failure of title.

Certainly it would not have been either equitable or just to refund the money to the purchaser under a warranty deed to reimburse him for his loss of the land, and refuse

to reimburse the purchaser at a judicial sale who had lost the land. It would not be in accord with natural justice or equity to forbid the entryman who had sold his land and given a warranty deed therefor from receiving the repayment of the purchase money, and to allow him to receive such repayment where his land had been sold to pay an honest debt. The clear reasons that must have governed Congress in enacting this statute forbid a narrow construction. They demand the usual and broad meaning of the word assigns.

Inasmuch as the word "assigns" is used in said act without any limitations, express or implied, it is conclusive that it included *all* "assigns," or grantees claiming under any form of deed or sale.

Goodman *vs.* Niblack, 102 U. S. p. 560.

We most respectfully submit that by no refinement of reasoning or metaphysical distinction can it be made to appear that the purchaser at a judicial sale has other or different rights under the second section of the act of June 16, 1880, than a purchaser at any other sale. When it is admitted that the "assigns" meant by that act are the grantees of the land, it must be conceded that it embraced all assigns of land without regard to the mode of sale or conveyance.

We respectfully request that the judgment of the Court of Claims be reversed, and that this court will direct it to enter judgment for the plaintiff in the sum of three thousand two hundred dollars.

Respectfully submitted.

Robt. ANDREWS & ANDREWS,

Attorneys for Plaintiff.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

J. HENRIETTA HOFFELD, EXECUTRIX OF Rudolph Hoffeld, deceased, appellant,
v.
THE UNITED STATES, APPELLEES.
No. 318.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

The findings of fact show (Transcript, pp. 3, 4, and 5) that on the 28th day of May, 1886, Harry Jones, J. L. Cole, Charles L. Weaver, and Samy Perri, through William Hinds, acting in their behalf, and under a power of attorney, made entry of the NE. ¼ of section 35, Township 14 S., range 87 west, of the sixth principal meridian, as coal entry No. 13, at Gunnison, Colo., and paid therefor the sum of $3,200. The affidavit required by section 32 of the coal-land regulations, which in effect requires the entryman to certify that he makes the entry in his own right and for his own benefit and not for the benefit of any other person, was not made by the several entrymen, but by

said Hinds as their attorney in fact. The affidavit was held to be insufficient by the officers of the General Land Office on April 12, 1888, and the local land officers were directed to notify the claimants to that effect. On August 27, 1894, the local land officers reported that two of the entrymen were dead; that Perri and Cole were no longer residents of Colorado; that their whereabouts could not be ascertained; that none of said entrymen had any interest in said land; that the representatives of the present owners, W. L. Youle, stated that the evidence required could not be furnished; that no coal in paying quantities had existed on said tract, and that the owners are indifferent as to whether said entry is canceled or not. Neither the entrymen nor their assignees took any action in the premises, and accordingly the entry was canceled by the General Land Office on the 24th of January, 1895. Previously, to wit, on May 29, 1886, the said entrymen had conveyed said land to the Ohio Creek Anthracite Coal Company. On August 29, 1887, a writ of attachment was issued out of the county court of Gunnison County, Colo., in a suit wherein A. S. Hinds was plaintiff and said company was defendant, and levied upon the aforesaid tract of land as well as upon other land belonging to said company. On August 23, 1887, a writ of attachment was issued out of the district court of Arapahoe County, Colo., in a suit wherein the Hendric and Bolthoff Manufacturing Company were plaintiffs and the Ohio Creek Anthracite Coal Company was defendant, and levied upon said land as well as upon other land belonging to

said company. On November 10, 1887, the aforesaid tract of land and other property was sold by the sheriff of Arapahoe County to Rudolph Hoffeld for the sum of $75 under said writ of attachment in the suit wherein the Hendric and Bolthoff Manufacturing Company were plaintiffs and the Ohio Creek Anthracite Coal Company was defendant. On June 10, 1897, William L. Youle, as attorney in fact for Rudolph Hoffeld, made application for repayment of the purchase money paid on said land under the provisions of section 2 of the act of June 16, 1880, which was denied on November 4, 1897, and again upon appeal to the Secretary of the Interior on December 11, 1899, for the reason that said application did not come within the provisions of said act of June 16, 1880, holding that the same had been procured through false and fraudulent affidavits, and also that the entry could have been confirmed if the affidavit required under section 32 of the coal-land regulations had been made. (See 20 Land Dec., 379.)

On June 5, 1900, the plaintiff brought an action in the Court of Claims to recover the said $3,200 purchase money paid upon said land, founding his claim upon an act of Congress, to wit, section 2 of the act of June 16, 1880 (21 Stats., 287). On January 21, 1901, the Court of Claims dismissed the petition of the plaintiff upon the ground that the purchaser at a judicial sale was not the assignee of the original entrymen within the meaning of that term as used in said act of June 16, 1880 (Transcript, pp. 5, 6, and 7). On February 11, 1901, the claimant made a motion for a

rehearing and new trial in said cause, assigning several errors of law in the opinion of the court. On April 8, 1901, the motion for a new trial and rehearing was overruled in a more extended opinion than was originally delivered, the court adhering to its former decision that the claimants in this case were not the assignees of the original entrymen (Transcript, pp. 8, 9, and 10). Whereupon this appeal was taken to this court.

BRIEF.

The question presented for consideration in this appeal is a narrow one, and consists of the interpretation of the second section of the act of June 16, 1880 (21 Stats., 287), which reads as follows:

> In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

In the case at bar there has not been any assignment by operation of the original entrymen, and the assignment, if any exists at all, is one by operation of

law upon the theory that the purchaser of this land at a sheriff's sale acquired not only all the right, title, and interest which the Ohio Creek Anthracite Coal Company had in the land itself, but in addition thereto acquired the right to the return of this purchase money created by the above-recited act as a right incident to and flowing from the acquisition of the land itself; in other words, that the right created by this statute is in the nature of a covenant flowing from the land, inseparable from the land itself, and in the nature of a covenant of warranty inuring to the benefit of the owner of the land whenever or however acquired.

This contention on behalf of the claimant was combated in the court below upon the ground that the right created by the above-recited act was a personal right inuring to the benefit of the original entryman or whomsoever he might personally assign the same in a sale of the premises, the right to the return of the purchase money in case the entry should be canceled being in the nature of a special warranty or a covenant of title to secure the alienee of the original entryman against loss in case of cancellation; but that the act never contemplated that this equitable right to the return of the purchase money in case of cancellation should be taken away from the original entryman or his alienee by any involuntary process of law, the result of which was to turn the Government into an agency for the collection of debts. These views met with the approval of the learned court below in two

opinions delivered by Weldon, J., and to the able presentation of the case made by the learned judge below, very little can or need be added.

Without being understood as saying that there can not be such a thing as an assignment by operation of law for certain purposes and under certain circumstances which it is not now necessary to discuss, yet it would seem clear that such result can not possibly follow upon the statute being considered to a purchaser at a judicial sale. The right to the return of the purchase money is purely a creature of the statute. It does not flow from any covenant, obligation, or equity, but has its sole existence in the provisions of this statute, without which it would be impossible to recover the money. Being, therefore, a thing created entirely by statute, it follows with unerring certainty that whosoever applies for the relief granted by the statute must bring himself squarely within its provisions, and can not rely upon any seeming right or equity *dehors* the statute.

Now, the statute gives this right to the entryman, his heirs or assigns, upon the surrender of the duplicate receipt issued by the local land office and upon the execution of a relinquishment of all claim to the land. There has been no assignment of this right by the original entryman to anyone except the Ohio Creek Anthracite Coal Company, from whom the appellant derived the same by a sale under an execution had and for the sum of $75, and we have the remarkable spectacle of a purchaser at a judicial sale

claiming the right to have returned to him the sum of $3,200 as the purchase money for a piece of property for which he only paid the sum of $75. On page 6 of the brief of the appellant there is an unwarranted statement that the consideration recited in the sheriff's deed, to wit, the sum of $75, was not the real consideration, but that the same was in fact much more, but that the attorneys did not think it necessary to prove the amount, since they were only entitled to the original purchase money. There is not a word in the record to warrant such a statement, nor was there a line of proof to this effect in the court below. The amount of the debt of the coal company for which the land was sold was not given, nor has there been any paper presented which shows any other or different consideration for the price of the land than the price recited in the sheriff's deed, to wit, the sum of $75.

It is well settled that the purchaser at a judicial sale takes the bare, naked legal title of the judgment debtor, unaccompanied by any special warranty or by any covenants in the mesne conveyances, or by any rights or equities existing in the judgment debtor which are not inherently and inseparably a part of the real estate so sold at said judicial sale. In other words, the purchaser takes what the sheriff has a right to sell, and nothing more. And of this he is charged with full notice under the doctrine of *caveat emptor*. (*Waples* v. *United States*, 110 U. S., 630, 633; *Burbank* v. *Conrad*, 96 U. S., 291.)

The sheriff in this case had no right to sell the equitable claim of the Ohio Creek Anthracite Coal Company to the refund of the purchase money under the act of June 16, 1880, and the decree of execution did not and could not undertake to clothe him with any such authority. The right of the Ohio Creek Anthracite Coal Company, as the assigns or alienees of the original entrymen, to the refund of this purchase money is still inherent in it; and if the United States owes this money to any one it owes it to the Ohio Creek Anthracite Coal Company, and repayment to the appellant would not discharge the Government's obligation, nor could the plea of such payment be successfully interposed against a suit for the return of money by that corporation. The claimants in this case acquired whatever rights the judgment debtor had in this land at the date of the sheriff's sale under execution, no more and no less. Of what that title was the claimant is charged with notice, and if it turns out that the claimant had no title to the land at all, then it follows that the sheriff could not sell the land nor the appellant purchase the same; and yet, although he got nothing whatever, no suit could be maintained by him to recover the amount of money which he paid for the land at said sale. (See *Waples* v. *United States*, *supra*.)

It is manifest from the language of the act itself that the intent of Congress was to refund such purchase money to the person who made the entry, or to such person as he himself had created as his successor in

right and from whom he had received the consideration of purchase, or in case of death to his heirs, and the word assign in the statute is meant to designate that person to whom the original entryman voluntarily transfers his interest under the statute. But it is thoroughly well settled that a judgment is not an assignment, because an assignment requires the act of a party, and a judgment is a mere act of law. (*Breading* v. *Boggs*, 20 Penn. St., 33; *Doe* v. *Devant*, 3 M. & S., 353.)

It would seem that the assignment referred to in this act relates to the assignment of land and not to assignment of the right to repayment contained in the statute, as witness the requirements concerning the surrender of the duplicate receipts and the execution of a quitclaim deed to the land. This construction would seem also to be necessary in view of the provisions of section 3477 Revised Statutes, which prohibits and renders null and void assignments of claims against the United States. (See *United States* v. *Gillis*, 95 U. S., 407; *Spofford* v. *Kirk*, 97 *id.*, 484; *Erwin* v. *United States*, *id.*, 392; but see *Goodman* v. *Niblack*, 102 U. S., 556, at page 560.)

At page 16 of the brief on behalf of the appellant the case of *Goodman* v. *Niblack* (102 U. S., 556) is cited as authority for the proposition that the use of the words "transfer" or "assign" in a statute is broad enough to include an assignment by operation of law, as well as by the act of a party. Undoubtedly this is true if the intention of the law-making power can be so gathered from a construction of the whole act;

and it is none the less true, conversely, that language used in a statute, although apparently general and unlimited, may and must be limited in its operation and effect where it may be gathered from the object and purpose of the whole statute that the language used was designed to apply to certain persons or things or was to operate only under certain conditions or to be enforced only by certain officers. (*McKee* v. *United States*, 164 U. S., 287, 293; *Brewer* v. *Blougher*, 14 Peters, 198; *United States* v. *Sanders*, 22 Wall., 492; *Murray* v. *Gibson*, 15 How., 421.)

In *Brewer* v. *Blougher* (14 Peters, 178), this court, through Mr. Chief Justice Taney, declared that "it is the duty of the court, in construing a statute, to ascertain the meaning of the legislature from the words used in it, and from the subject matter to which it relates, and to restrain its meaning within narrower limits than its words import, if satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

And in *McKee* v. *United States* (164 U. S., 287) this doctrine was reannounced and reaffirmed by the court through Mr. Justice Peckham. This, of course, is nothing more than the basic principle that the courts will endeavor to ascertain the intent of the legislature in passing a given act and to enforce the act in conformity with the intent thus ascertained. One of the most satisfactory, as well as the most legitimate ways of ascertaining this Congressional intent, is by having reference to the proceedings and debates on the bill in

the two Houses of Congress. (*Northern Pacific Railroad Co.* v. *McRae*, 6 Land Dec., 400–402, per Secretary, afterwards Mr. Justice, Lamar; *Blake* v. *National Bank*, 23 Wall., 307.)

Upon this principle it will be enlightening to glance for a moment at the legislative history of the act of June 16, 1880, in so far as it affects the second section of the act, and omitting those portions relating to the other sections of the act which have no relevancy here. This may be done very briefly. The bill (H. R. 3171) was introduced in the House by Mr. Page, of California, on January 7, 1880, and was referred to the Committee on Public Lands (Cong. Rec., vol. 10, part 1, p. 20) April 6, 1880, reported favorably with certain amendments, and referred to the Committee of the Whole (Cong. Rec., vol. 10, part 3, p. 2168) May 20, 1880. The bill and amendments were debated and considered as follows: (Cong. Rec., vol. 1, part 4, pp. 3594 to 3596, both inclusive.) After the bill had been read Mr. Berry said:

* * * * *

> The Secretary of the Interior is authorized, upon proof being made to his satisfaction that any tract of land has been erroneously sold by the United States, so that from any cause the sale can not be confirmed, *to repay to the purchaser or his legal representatives or assignees* the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated.

* * * * *

This bill aims to return those fees and commissions paid upon warrants found to be fraudulent, and which have been canceled. The object of the measure is, Mr. Chairman, that where the party who has honestly entered land upon those fraudulent warrants, and where they have lost the land, they ought not to be required to lose also the fees and commissions paid to the Government. If the bill is properly guarded it is manifestly just.

* * * * *

The chairman of the committee then called for the report of the Committee on Public Lands, and those portions of it which refer to section 2 of the act are here inserted.

The Committee on Public Lands, to whom was referred bill H. R. 3171, have considered the same, and report as follows:

* * * * *

Your committee think the bill properly guarded and its object manifestly just. The Government should certainly refund the money to the parties to whom it justly belongs, and has no right to retain money for which it gave nothing. Your committee therefore recommend the passage of this bill with the amendments proposed.

Mr. Page, chairman of the committee, said:

* * * The second section provides that in all cases where homestead or timber-culture or desert-land entries or other entries on public lands have been canceled for conflict, or where for any cause the entry has been erroneously

allowed, the fees paid into the Land Office, which have afterwards gone into the Treasury of the United States, *may be refunded to those parties.*

Of course, if the members of this committee will reflect for a moment, they will see it is unjust *to those parties* that the Government should retain their money when they have had no value for it in a single instance. The money was paid as fees and commissions to the registers and receivers of the Land Office. When they came here, it was found the entries had been erroneously allowed, and the Government could not comply with the conditions of the law, and therefore it is wrong that *these people* should lose the fees and commissions paid by them.

* * * * *

Mr. PLUMB. The second section refers to a class of cases which frequently arise in the administration of the laws with regard to the public domain where errors occur. A person is erroneously permitted to enter a quarter section of land and pays for it. In a large number of these cases the Department holds under the law, as it now stands, that it can not refund the amount, notwithstanding the party who makes the entry does not get the land he pays the money for. It occurs frequently in town-site entries where the lands are discovered subsequently to have been withdrawn for railroad purposes. It occurs, too, that private parties have made preemption entries upon lands of a similar character. There is a great mass of cases where erroneous entries are made from misdescriptions of land, and so on.

Mr. PADDOCK. And where the local land officers themselves are responsible for the errors and not the parties making the entries.

Mr. PLUMB. Whether they are responsible solely or not, at all events they are responsible, because they permit entries to be made that it subsequently turns out should not have been made, and inasmuch as the settler or person seeking to make the entry depends on the local officer for his information in regard to the character of the land—that is to say, that it is land which he may properly enter—it is perhaps primarily the error of the land office. In all these cases *the Government gets from these innocent persons* fees, and in many cases the price of the land, which it religiously holds on to and does not pay back, as it ought to do. This second section is for the purpose of compelling repayment.

It will be seen, therefore, that the sole idea in the mind of Congress in passing this act was to protect the original entryman in having the purchase price, or the fees and commissions, as the case may be, returned to him in case his entry is subsequently canceled and the Government continues to hold his money without consideration. The word "heirs," of course, in this connection was inserted to protect his legal representatives in the case of his death, and the word assigns, of course, was inserted in order to enable him to dispose of the land, to find a purchaser for the land after the final receipt had been obtained and before the issuance of patent, so that his alienee, trans-

feree, or assignee would be subrogated to his rights in case the entry was subsequently canceled. The object, therefore, all through was to protect the entryman, but the construction which is sought to be placed upon this act by the appellant leads to the very opposite of this intent and instead of protecting the entryman, works upon him a great hardship by enabling some creditor to recover from the United States the money which he had paid for the land, and thus resulting in his loss of the land and in the loss of the purchase money. There are no safeguards to such a construction, and if once adopted the direst evil might result to the entryman. Suppose, for example, A purchased a quarter section of coal land, as was done in this case, paid therefor the sum of $3,200, and suppose that A owed some creditor the sum of $500 and the creditor should bring action against A, recover judgment, levy an execution upon said land, and sell it, and B should purchase the same for the $500 with accrued costs, and then suppose that the entry was canceled. According to the construction of the appellant, B, who purchased this land at the execution sale for the sum of $500, is now entitled to demand and receive from the Government the amount of A's original purchase price upon that land, thus to get the sum of $3,200 upon an outlay of $500. This only serves to show the possible hardships and absurdities which would result from a construction such as the claimant seeks to have placed upon this act. "While the consequences of a construc-

tion are not conclusive, yet sometimes they are worthy of notice"—per Mr. Justice Brewer in *United States* v. *Edmonston* (181 U. S., at p. 514). It was never the intent of the Congress that assignments by operation of law, if such an expression can be properly used in this connection, or, in other words, an enforced relinquishment of the land by the original entryman against his will and consent, should carry with it a right to the refund of this purchase money. The Government did not intend by the passage of this act to bring itself into a debt-collecting agency; its intention was to protect an innocent entryman who, by act of the Government, had lost his land, and the benefits were intended to be received by him, or by such person as he should voluntarily name.

It is submitted that the judgment of the court below is clearly correct and should be affirmed.

GEORGE HINES GORMAN,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 318.—October Term, 1901.

J. Henrietta Hoffeld, Executrix of Rudolph Hoffeld, deceased, Appellant, *vs.* The United States. | On appeal from the Court of Claims.

[June 2, 1902.]

This was a petition of J. Henrietta Hoffeld, executrix of the estate of Rudolph Hoffeld, deceased, for the repayment to her by the United States, under the act of June 16, 1880, (21 Stat. 287,) of the purchase money for one hundred and sixty acres of coal lands, the entry of which had been canceled by the Commissioner of the General Land Office on January 27, 1895, over eight years after the purchase was made, and more than seven years after Hoffeld had bought the land.

The purchase from the United States was originally made by other parties for a consideration of thirty-two hundred dollars. These parties had conveyed the lands to the Ohio Creek Anthracite Coal Company, against which company a judgment had been obtained, and a sale made November 10, 1887, to Rudolph Hoffeld, purchaser under the execution. Petitioner was his executrix. Several years after the sale the Commissioner of the General Land Office found that an error had been committed, in the allowance of the original entry upon the affidavit of an attorney, in the absence of the original entrymen. He thereupon exacted an affidavit of these entrymen, but as two out of the four were dead, and the other two could not be found, it was impossible to comply with the requirement of the Commissioner, who canceled the purchase, as above stated.

The Court of Claims made a finding of facts substantially as above stated, and decided, as a conclusion of law upon such facts, that the claimant had no right to recover, and the petition was therefore dismissed.

Mr. Justice Brown delivered the opinion of the Court.

This case depends upon the construction given to section 2 of the act of June 16, 1880, (21 Stat. 287,) which reads as follows:

"In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, *or to his heirs or assigns*, the fees and commissions, amount of purchase money, and excesses paid

upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office."

In the case under consideration, the entry had been made May 28, 1886, by Harry Jones, J. L. Cole, Charles L. Weaver and Samy Perri, through William Hinds, acting in their behalf under a power of attorney, paying therefor to the United States the sum of thirty-two hundred dollars. Section 32 of the Coal Land Regulations requires the entryman to certify in an affidavit that he makes the entry in his own right and for his own benefit, and not for the benefit of any other person. This affidavit was not made by the entrymen themselves, but by Hinds, as their attorney in fact. It was held to be insufficient by the General Land Office, and the local land offices were required to notify the claimants to that effect, and to require a new affidavit. Owing to the death of two of the entrymen and the impossibility of findi the two others, the affidavit could not be procured, and the entry was canceled by the Land Office, January 24, 1895. Previously thereto, and on May 29, 1886, the entrymen had conveyed the land to the Ohio Creek Anthracite Coal Company, against whom a writ of attachment was issued, a judgment obtained, and an execution issued, levied upon this tract of land, which was sold by the sheriff to Rudolph Hoffeld for the sum of seventy-five dollars, and on January 10, 1897, Hoffeld made application for repayment of the purchase money under the provisions of the above act.

The act requires that where, from any cause, the entry has been erroneously allowed and cannot be confirmed, repayment shall be made of the consideration to the entryman, or to his *heirs or assigns*, and the only question for our consideration is, whether the purchaser of the original rights of an entryman at an execution sale against him or his grantee can be said to be an "assign" within the meaning of the act.

"Assigns," or, as the word is more commonly spelled, "assignees," are of two classes, depending upon the manner of their creation: first, voluntary assigns, who are created by act of the parties; and, second, assignees created by operation of law. Whether in a given case an assignee belongs to the first or second class depends upon the purpose for which he was created, the object to be attained by his creation, and the language of the statute or other instrument from which he derives his powers. A voluntary assignee is ordinarily invested with all the rights which his assignor possessed, with respect to the property; while the rights of an assignee by operation of law are such only as are necessarily incident to the complete possession and enjoyment of the things assigned. A voluntary assignee takes the property with all the rights thereto possessed by his assignor, and if he has paid a valuable consideration, may claim all the rights of a

bona fide purchaser with respect thereto. Upon the other hand, an assignee by operation of law, as, for instance, a purchaser at a judicial sale, takes only such title as the execution debtor possessed at the time of sale. (*The Monte Allegre*, 9 Wheat. 616.) The doctrine of *caveat emptor* applies in all its rigor, and the buyer cannot set up the rights of a *bona fide* purchaser, even against an unrecorded deed. Thus in *Burbank* v. *Conrad*, (96 U. S. 291,) it was said of property condemned and sold as enemies' property under the confiscation act, that "the United States acquired by the decree, for the life of the offender, only the estate which at the time of the seizure he actually possessed; not what he may have appeared from the public records to possess, by reasons of the omission of his vendees to record the act of sale to them; and that estate, whatever it was, for that period passed by the marshal's sale and deed; nothing more and nothing less. The registry act was not intended to protect the United States in the exercise of their power of confiscation from the consequences of previous unrecorded sales of the alleged offender." It was held in connection with the same transaction that the purchaser was not even entitled to a return of his purchase money. (*Waples* v. *United States*, 110 U. S. 630.)

The case of the *City of Norwich*, (118 U. S. 468,) though arising under the maritime law, is pertinent in this connection. This was a petition under the limited liability act, R. S. sec. 4285, which declares that if the owner of a vessel elect to take the benefit of the act, it shall be a sufficient compliance with the law "if he shall transfer his interest in such vessel and freight, for the benefit of the claimants, to a trustee," who becomes in reality an assignee for the benefit of creditors under the act. It was held that the word "interest" was intended to refer to the extent or amount of ownership which the party had in the vessel and freight, and that whatever the extent or character of his ownership might be, the amount or value of that interest was to be the measure of his liability. It was also held that his transfer of such interest under the law did not operate as an assignment of his insurance upon the vessel, which was a collateral contract, personal to the insured, but not conferring upon him any interest in the property; in other words, the contract of insurance does not attach itself to the thing insured or go with it when it is transferred. (See cases cited 118 U. S. 494.)

Upon the other hand, an assignee by operation of law may, under certain circumstances, have greater rights than a voluntary assignee. Thus in *Erwin* v. *United States*, (97 U. S. 392,) it was held that the act of February 26, 1853, (R. S. sec. 3477,) nullifying and avoiding all transfers and assignments of any claim upon the United States, applied only to cases of voluntary assignments of demands against the government, and that it did not embrace cases where there had been a transfer of title by operation of law. "The passing of claims to heirs, devisees or assignees in

bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the Court of Claims."

In *Goodman* v. *Niblack*, (102 U. S. 556,) this doctrine was applied to a general assignment for the benefit of creditors.

Referring now to the statute of June 6, 1880, (21 Stat. 287,) we find that its requirements are, first, that the entry must have been canceled for conflict, or from some cause must have been erroneously allowed; second, that repayment must be made to the person who made the entry, or to his heirs or assigns; and, third, that such repayment should only be made upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to the land. The last requirement is strong evidence tending to show that voluntary assigns are only contemplated by the act, as they would naturally take the receipt with the deed of the land and be in a condition to relinquish all claims thereto, while an assign by operation of law would have no means of compelling a delivery of the receipt to him. The purchaser at an execution sale would only take the actual title of the owner to the land itself, unaccompanied by any collateral claims or rights incident to the acquisition of the land. In this respect he stands much as an assignee under the limited liability act, who, as above stated, takes the interest of the owner in the vessel and freight, but not his interest in a collateral contract of insurance. The contract evidenced by the statute is really a contract of indemnity, and provides, much like a policy of insurance, that if the owner lose his property he shall recover what he paid for it. We see no reason why the general rule above stated, that a contract of insurance does not accompany a transfer of the thing insured, does not apply to this statute.

It will be readily seen that complicated questions might arise in case the entryman should make a voluntary conveyance of the land accompanied by a surrender of his duplicate receipt, or should assign his receipt to another than the execution purchaser. The requirement that the receipt shall be surrendered is as peremptory as the requirement that the person demanding repayment shall be an heir or assign of the original entryman. The petition in this case contains no averment of petitioner's readiness to surrender the duplicate receipt, or any excuse for a failure to do so, but simply sets forth the title of Rudolph Hoffeld as purchaser under an execution sale upon the judgment against the Ohio Creek Anthracite Coal Company, although the court finds as a fact that it appeared from an affidavit that the duplicate receipt had been destroyed by fire. As bearing upon the equities of the case it is pertinent to remark that Hoffeld bought the property in question for a recited consideration of $75, but that under the statute he claims the whole sum of $3,200 which was paid to the United States at the original entry of the land. He thus by an expenditure of $75 recovers

$3,200, while neither the original entrymen who paid the $3,200 nor their assignee, the Coal Company, recover anything. Inasmuch as, in the absence of a statute, there could be no recovery of the purchase money, (*Waples* v. *United States*, 110 U. S. 630,) one who seeks to take advantage of it must bring himself clearly within its equity as well as within its letter, and must show himself entitled not only to the land itself, but to everything which the statute has annexed thereto as an incident. The right to a return of the purchase money is in no sense an incident to the land, and did not pass to the purchaser upon the sale under the execution.

On the whole we are of opinion that the petitioner has not shown herself an assign of the original entryman or otherwise entitled herself to the benefit of the statute, and the judgment of the Court of Claims dismissing her petition is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.